

After hearing the evidence presented at a Preliminary Hearing held on September 27, 1994, Administrative Law Judge Nelsonna Potts Barnes granted the claimant's request for temporary total disability and medical benefits. The Administrative Law Judge found that the claim was compensable. At the preliminary hearing, the respondent raised the defense contained in K.S.A. 44-501(d)(1), that generally provides denial of compensation if the injury to the employee results from the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished by the employer. The Administrative Law Judge found that the respondent had failed to meet its burden of proof under K.S.A. 44-501(d)(1) and K.A.R. 51-20-1. The regulation that is cited by the Administrative Law Judge provides that failure of an employee to use safety guards provided by the employer, will not prejudice any employee's right to compensation where safety rules have generally been disregarded by employees and not rigidly enforced by the employer. K.A.R. 51-20-1.

At the preliminary hearing, the claimant requested compensation benefits alleging injury from a series of repetitive traumas from November 1993, through May 10, 1994. Prior to the claimant developing bilateral carpal tunnel syndrome, she was employed by the respondent as a claim processor which required her to enter claims on a computer using a keyboard for eight (8) hours per day. Respondent presented evidence that the claimant was given the opportunity to use wrist support pads in 1992 and declined to use them. Evidence was presented that the claimant was the only claims processor who refused to use the wrist support pads and was also the only claims processor that developed carpal tunnel syndrome. The respondent argues that the claimant's request for compensation benefits should be denied on the basis that the claimant willfully failed to use the wrist support pads provided by the respondent as specifically provided for in K.S.A. 44-501(d)(1).

Claimant contends that the respondent has failed to prove the willful failure of the claimant to use a reasonable and proper guard and protection. Claimant argues that the evidence supports the fact that the respondent did not make it mandatory for the employees to use the wrist supports and further the evidence establishes the employees were not told that the purpose of the support pads was to prevent carpal tunnel syndrome. The claimant also testified that her treating physician, Dr. Artz, indicated that there is no proof the wrist support pads would have prevented claimant from developing carpal tunnel syndrome.

For preliminary hearing purposes, the Appeals Board, after reviewing the whole record, affirms Administrative Law Judge Nelsonna Potts Barnes' finding that the respondent has failed to prove that the claimant willfully failed to use a reasonable and proper guard provided by the employer. Since respondent did not make it mandatory for the claimant to use the wrist support pad, the employer can not now come forward and claim that the claimant willfully refused to use a reasonable and proper safety device. Additionally, there is no evidence that has been presented by the respondent that use of the wrist support pad would have prevented the development of claimant's carpal tunnel syndrome.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Nelsonna Potts Barnes, dated October 10, 1994, is affirmed and remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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